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ONE CIVIL LIBERTARIAN AMONG MANY: THE CASE OF MR. JUSTICE GOLDBERG

*Ira H. Carmen**

IT is common knowledge that in recent times the constitutional issues of greatest magnitude and of greatest public interest lie in the area of civil liberties. These cases almost always call for the delicate balancing of the rights of the individual, allegedly protected by a specific clause in the Constitution, and the duties that state or federal authority can exact from citizens in order that society may maintain a minimum standard of peace and security. It follows, therefore, that it is these often dramatic decisions which will largely color the images we have of participating Justices. Assume a free speech controversy. Stanley Reed's image? He typically voted against a first amendment claim. Sherman Minton? The probabilities are similar. Earl Warren? The opposite. William O. Douglas? He generally supports such claims. Law School classes as well as graduate seminars in political science are forever talking about the "Black faction" and the "Frankfurter bloc." Comparing and contrasting the two has become a fairly common exercise.

Arthur J. Goldberg came to the Supreme Court in time to participate in all of the decisions handed down during the 1962 Term. He resigned his office soon after the conclusion of the 1964 Term. What image does his name evoke after less than three years on the bench? If a member of the American Civil Liberties Union were asked what he thought of President Kennedy's appointments to the Court, his response would probably be: "Goldberg is a good man, but White has been a disappointment." In short, if Goldberg's image is at all accurate, the probabilities favor his support of a "libertarian" as opposed to a "societal" interpretation of appropriate provisions of the Constitution. On the other hand, if our hypothetical A.C.L.U. advocate, or anyone else for that matter, were asked to generalize about Goldberg's point of view vis-à-vis other Justices with a *similar* orientation, that is, if he were asked whether there are any significant differences among the so-called "libertarian" ideologies presently represented on the Court, the chances are good that his response would be vague and indecisive.

This paper has two basic purposes:

1. To demonstrate empirically that Mr. Justice Goldberg, was, in fact, inclined to espouse the constitutional philosophy

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relating to personal rights which his image projects. An extension of the use of appropriate techniques will also permit a classification of his eight colleagues along a "liberty-authority" continuum for the same period of time.

2. To analyze the similarities and, more important, the dissimilarities between Goldberg and other Justices of a similar ideological bent so as to understand better the complexities of his civil libertarian commitment.

If, indeed, there is a "Black bloc" with an individualistic credo, the scholar must do more than isolate this credo from competing constitutional philosophies. He must also acquaint himself with its internal dynamics. Insofar as Arthur Goldberg is concerned, he must present his subject not just as a member of an alliance, but as an individual as well.

I. MODE OF ANALYSIS AND EMERGING BLOCS

The process which has been selected to determine those Justices who, during the 1962-1964 Terms, seemed to espouse the constitutional doctrine of "libertarianism" is somewhat different from other quantitative approaches that have been used to discern judicial voting propensities.¹ First, each formal opinion or per curiam holding which contained a clear divergence of opinion on a civil liberties issue was included in the sample. The phrase "civil liberties issue" comprises all claims of privilege brought to the Supreme Court which were predicated on the first eight amendments, the fourteenth² and fifteenth amendments, and other specific clauses in the Constitution which can reasonably be thought to preserve fundamental liberties of the person, such as the prohibition against bills of attainder and the guarantee of the writ of habeas corpus. Second, in coding the responses of Justices to conflicting interpretations of these provisions, two mutually exclusive indices were developed. The first assigned "libertarian" votes to Supreme Court members who specifically opposed a "societal" interpretation held to be valid by at least one of their number. In other words, should the Justices split in resolving a fourth amendment issue, those who

1. See Appendix A for a critical analysis of the techniques that have been utilized by political scientists C. Herman Pritchett, Glendon Schubert and others.

2. However, claims which sought to invoke the fourteenth amendment's protection of property interests were not scored except for those instances in which the "just compensation" provision was being applied to state action. It is clear that the civil libertarians on the Court are precisely those Justices who most vigorously oppose the "invisible radiations" of substantive due process or equal protection as to *this* class of cases. See, e.g., *American Oil Co. v. Neill*, 380 U.S. 451 (1965).

supported the community's interest in the fruits of a search or seizure would be coded as being opposed to those who found in favor of the individual's interest in being free from government interference; the former would therefore be viewed as having expressed "pro-societal" sentiments while the latter would be considered as having advocated a "pro-libertarian" posture. The second index consisted of Mr. Justice Goldberg's "pairs" with each of his colleagues in these cases irrespective of the attitude espoused.

It should be obvious that these indices could not have been constructed without a careful content analysis of the cases involved. Some of the guidelines used in performing this task deserve mention. First, no formal or per curiam opinion was included unless a unique constitutional question was in dispute. For example, consider a per curiam decision in which the Court reversed the lower court's decision in a one-sentence opinion, citing as authority only an earlier case, while the dissenters merely made note of their opposition as explicated in that prior case.³ Or, consider the several reapportionment cases decided (by formal opinion) on the basis of *Reynolds v. Sims*.⁴ Several of these have been excluded from the count of holdings because once one knows that the Court advocates the "one man-one vote" rule there is nothing in the facts of these later controversies which makes them unique.⁵ Second, Justices are coded together even if they did not join one another's opinions if content analysis reveals that they stand as one on the constitutional issue in question. This criterion might be applicable to those dissenting separately, to those concurring separately, and to both concurring and dissenting Justices vis-à-vis the opinion of the Court. It follows, therefore, that content analysis may also reveal that concurrences are in the nature of dissents, in that they represent disagreements along the "libertarian" dimension.

The principle difference, however, between the mode of classification utilized in this study and others that have been attempted is that this technique places greater emphasis on the constitutional nuances of the cases in the sample and permits the counting of several issues of importance in a single case. Consider *A Quantity of Books v. Kansas*.⁶ The attorney general of Kansas had directed a county sheriff to seize and impound, pending a hearing, copies of

3. See, e.g., *Fields v. South Carolina*, 372 U.S. 522 (1963).

4. 377 U.S. 533 (1964).

5. See, e.g., *WMCA, Inc. v. Lomenzo, Inc.*, 377 U.S. 633 (1964). However, *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964), was included because of the referendum facet of that case. Mr. Justice Harlan is coded in opposition to the Court's holding even though he felt his dissent in *Reynolds* was sufficient to cover the issues presented.

6. 378 U.S. 205 (1964).

certain paperback novels which he deemed obscene. In an *ex parte* proceeding conducted prior to confiscation, a district judge perused several of the titles, concluded that the books appeared to be obscene, and issued an order to effect the seizure. By a vote of seven to two, the Supreme Court reversed the state supreme court's decision upholding the attorney general's actions. Four of the Justices (Brennan, Warren, Goldberg, and White) thought that the procedure was a violation of first amendment rights because it did not adequately safeguard against the suppression of books which were not obscene. Justices Black and Douglas, on the other hand, believed that the state could not pass *any* law inhibiting the dissemination of allegedly obscene books. They did not "find it necessary to consider the procedural questions" which had buttressed Mr. Justice Brennan's opinion.⁷ Mr. Justice Stewart supplied the seventh vote by noting that he had read the books, that he considered them protected by the first amendment, and that, therefore, they could not be proscribed whatever the means. He added, however, that the law would be constitutional if it were applied to hard-core pornography. In dissent, Justices Clark and Harlan argued that the state could reasonably ban the books in question and that the means used in this particular case did not violate first amendment privileges.

This is an instance in which controversy was so bitter that no opinion was written for the Court. It is submitted that the only feasible way to unravel the conflicting constitutional philosophies at issue in this case is to apply content analysis to the opinions of the Justices. In this way the subtle shadings of "libertarianism" become more manifest, and the divisions among Supreme Court members are more clearly exposed. The first cleavage appears to center around the validity of the procedures invoked by Kansas officials to deal with obscene literature. Four Justices denounced these practices as violations of first amendment liberties; three Justices, Harlan, Clark, and Stewart, opposed this conclusion;⁸ Justices Black and Douglas did not even discuss the procedural aspect of the case and therefore should not be coded as participants in its resolution. A second significant issue in this case deals with whether the books themselves were obscene. While this is also a first amendment question, it is of a much different nature than the procedural inquiry. This is illustrated by Stewart's concurrence, for he found that the

7. *Id.* at 213.

8. Stewart was noncommittal on the constitutionality of the statute vis-à-vis the books which the judge had not inspected in advance of seizure. This is irrelevant for present purposes, however.

procedures were valid, but agreed with Black and Douglas that the books were not obscene; only Harlan and Clark thought that these volumes could be suppressed; since the other four Justices deliberately avoided the question of obscenity, their votes cannot be counted on this issue.⁹

The initial step to pinpoint "libertarian" sentiment on the Court was to locate those cases in a particular term which contained divergent interpretations of relevant constitutional issues. Participations and "libertarian" responses were counted, and percentages were computed by dividing the former into the latter. Looking first at the 1962 Term, it can be seen that twenty decisions including twenty-four issues qualified for tabulation.¹⁰

TABLE A
LIBERTARIAN RESPONSES, 1962 TERM

	Participations	Libertarian Responses	Percentage
Douglas	24	24	100
Warren	24	22	92
Black	24	21	88
Goldberg	24	21	88
Brennan	24	21	88
White	24	12	50
Stewart	24	8	33
Clark	24	8	33
Harlan	24	3	13

These figures confirm the fact that there were five members of the Court who consistently construed the relevant provisions of the Constitution so as to favor the personal rights of the individual.^{10a} However, the identification of ideological clusters in Supreme Court decision-making requires more than the casuistic "these Justices seem to vote alike most of the time." A more rigorous test which could well be applied in our study is Schubert's Index of Inter-agreement, which is computed by taking each pair of Justices in the sample and dividing their joint participations into their joint

9. Under the criteria established for application of this "issues test," a third cleavage would ordinarily have to be coded. This would have the effect of setting off Black and Douglas from those Justices who believed that obscenity could be proscribed as a matter of law. This issue, however, is dealt with in another controversy, *Jacobellis v. Ohio*, 378 U.S. 184 (1964). See note 20 *infra* and accompanying text.

10. Appendixes B, C, and D provide a list of cases scored for the 1962, 1963 and 1964 Terms respectively. Those decisions which cover more than one issue are also noted as are those judgments in which so-called "libertarians" are found on opposite sides.

10a. Using a much different approach, Schubert has rated Goldberg's "libertarian" affinities during this term as less strong than those of Douglas, Black, Warren, and Brennan in that order. See Schubert, *Report and Analysis of the 1962 Term Predictions*, in *JUDICIAL BEHAVIOR* 582 (Schubert, ed. 1964).

votes.¹¹ In Schubert's judgment, an Index of Interagreement of seventy per cent is high, an Index of sixty to sixty-nine per cent is moderate, and an Index below sixty per cent is low. The aims and techniques that underlie this study differ from Schubert's only in that we are: (1) coding "issues" rather than "votes"; and (2) concentrating on the voting patterns of one Justice in relation to his colleagues, rather than formulating generalizations about all nine Justices in interaction with one another. Thus, our Index was obtained by dividing the number of Mr. Justice Goldberg's joint participations into the number of his joint agreements. The application of this Index to the selected cases taken from the 1962 Term shows that Goldberg had a startlingly high interagreement quotient with Black, Douglas, Warren, and Brennan, a moderate kinship with White, and little in common with the others.

TABLE B
INDEX OF INTERAGREEMENT FOR MR. JUSTICE GOLDBERG, 1962 TERM

	Participations	Agreements	Percentage Agreement
Brennan	24	24	100
Douglas	24	21	88
Warren	24	21	88
Black	24	20	83
White	24	15	63
Stewart	24	11	46
Clark	24	11	46
Harlan	24	6	25

In the 1963 Term, twenty-three cases including thirty-five issues were found to be appropriate for our purposes. The strength of each Justice's "libertarian" credo is as follows:

TABLE C
LIBERTARIAN RESPONSES, 1963 TERM

	Participations	Libertarian Responses	Percentage
Douglas	30	27	90
Goldberg	33	28	85
Black	32	26	81
Brennan	30	21	70
Warren	33	21	64
Stewart	30	14	47
White	28	13	46
Clark	32	6	19
Harlan	32	1	3

Justice Goldberg's "libertarian" predispositions which were evident in the 1962 Term continued substantially unchanged during

11. QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 91 (1959).

the 1963 session. In this regard, his record of consistency was matched by those of Black and Douglas, the latter having proven himself to be more amenable to the personal rights at issue than his colleagues in both of these years. The Chief Justice, on the other hand, showed a sharp falling off in his civil liberties commitment, having descended from a peak of ninety-two to sixty-four per cent. Mr. Justice Brennan, to a lesser extent, moved in a similar direction. Among the "non-libertarians" of the 1962 Term, Mr. Justice White, joined by Mr. Justice Stewart, occupied a middle position on our continuum, while Justices Clark and Harlan became far more "authority-oriented" than they had been. It is obvious that during this term several issues were presented which tended to undermine the solidarity of the "libertarian" faction. The nature of these controversies also caused the others to become even more widely spread along the spectrum than had heretofore been the case. How this increasing diffusion of the Court affected Mr. Justice Goldberg's joint assents is reflected in the following table:

TABLE D
INDEX OF INTERAGREEMENT FOR MR. JUSTICE GOLDBERG, 1963 TERM

	Participations	Agreements	Percentage Agreement
Douglas	28	26	93
Brennan	30	25	83
Warren	33	26	79
Black	30	20	67
White	28	16	57
Stewart	29	16	55
Clark	31	6	19
Harlan	31	4	13

The application of the Index of Interagreement to these data finds Goldberg's intense bond with Douglas, Brennan, and Warren continuing into 1963, while his link with his fellow Kennedy appointee, Mr. Justice White, was no longer of consequence. The most significant insight that is captured in these statistics, however, can be gleaned from a close inspection of Goldberg's ties with Black and the Chief Justice. Justice Black, as has been seen, maintained his civil liberties orientation in 1963, while the Chief Justice adopted a far more "balanced" view in adjudicating these issues. Yet Goldberg's attachment to attitudes expressed by the Chief Justice was stronger than was his acceptance of Black's ideas; indeed, his sixty-seven per cent affiliation with the latter was only at the "moderate" level of cohesion. Clearly, Goldberg's conception of valid "libertarianism" varied appreciably from Black's notions during this term.

Turning to the 1964 session, twenty-six cases containing thirty-four issues appear to qualify for consideration.

TABLE E
LIBERTARIAN RESPONSES, 1964 TERM

	Participations	Libertarian Responses	Percentage
Douglas	34	29	85
Black	33	22	67
Goldberg	34	22	65
Warren	31	18	58
Brennan	33	16	48
Stewart	32	12	38
White	33	11	33
Clark	33	11	33
Harlan	33	6	18

Of the Justices who, in 1962, gave overwhelming support to individual rights, only Douglas had managed to hold his ground. Goldberg and Black still took an "anti-societal" position two-thirds of the time, but their commitments had obviously abated somewhat.^{11a} The decline of "libertarianism" was most evident in the cases of Warren and Brennan; indeed, the latter was far closer to Stewart, White, and Clark than he was to Douglas. One can say without dispute that there was no civil liberties bloc during the 1964 Term.

Surely one might expect this diffusion in coping with civil liberties controversies to leave its imprint on the propensities of Justices to align themselves with their brethren. This expectation is fulfilled when one considers the data on interagreement for the 1964 session.

TABLE F
INDEX OF INTERAGREEMENT FOR MR. JUSTICE GOLDBERG, 1964 TERM

	Participations	Agreements	Percentage Agreement
Warren	31	28	90
Brennan	33	28	85
Douglas	34	25	74
Clark	32	23	72
White	32	22	69
Stewart	32	22	69
Harlan	32	19	59
Black	32	15	47

The Index of Interagreement illustrates the fact that Goldberg again exhibited a high degree of affinity with Justices Douglas, War-

11a. Spaeth, through the use of Guttman scaling, has concluded that, "[i]n the 1963 and 1964 terms, Goldberg's support of civil liberties was exceeded only by Justice Douglas." See SPAETH, *THE WARREN COURT* 28 (1966). This generalization is clearly not consistent with the 1964 Term analysis herein presented.

ren, and Brennan. Although Brennan voted less than fifty per cent of the time for a "pro-libertarian" result, he still agreed with Goldberg eighty-five per cent of the time. Obviously, these two members of the Court must have voted together in opposition to the civil liberties views of others; furthermore, it must be remembered that Goldberg himself voiced "libertarian" sentiments only sixty-five per cent of the time. The break between Goldberg and Black reached a crescendo during this term. Each continued to support civil libertarian claims, although in a less intense manner than before, but their Index of Interagreement points up a real ideological hostility between them. Note also the extraordinarily high rate of concurrence between Goldberg and Clark and, indeed, Goldberg's moderate support for attitudes expressed by White and Stewart. What had happened, evidently, was that the "anti-authoritarian" philosophies of Black and Goldberg were functioning in an inverse relationship; each was resisting the other's "libertarian" sorties. Only this opposition to Black's brand of civil liberties can explain Goldberg's new-found affinity with the voting habits of Mr. Justice Clark, whose "societal" predilections had been manifest throughout these three terms.

Thus far, our analysis of Goldberg's attitudes on civil liberties questions has stressed the evolution of these sentiments as compared to those of others and as gauged against an abstract "freedom v. authority" model. A summary of the results obtained over the entire three terms will be useful in assessing the total picture. Beginning first with "libertarianism," a statistically more meaningful expression of each Justice's affiliation with this doctrine may be attained by dividing the total number of "civil libertarian" choices of each Justice by the total number of participations.

TABLE G
LIBERTARIAN RESPONSES, 1962-64 TERMS

	Participations	Libertarian Responses	Percentage
Douglas	88	80	91
Goldberg	91	71	78
Black	89	69	78
Warren	88	61	69
Brennan	87	58	67
White	85	36	42
Stewart	86	34	40
Clark	89	25	28
Harlan	89	10	11

The Court was clearly divided during these three terms into two competing factions. The first, ranging from Douglas to Brennan, espoused a general commitment to the "libertarian" ideology.

With respect to Warren and Brennan, this linkage could be classified as moderate, but nonetheless significant. As for the other four members of the Court, the differences between them were clear-cut at times, but each evidently rejected the idea that "libertarianism" is a value to be prized above "authoritarianism," at least so far as our sample of issues is concerned.

A three-term analysis of Mr. Justice Goldberg's joint participations and policy agreements yields the following results:

TABLE H
INDEX OF INTERAGREEMENT FOR MR. JUSTICE GOLDBERG, 1962-64 TERMS

	Participations	Agreements	Percentage Agreement
Brennan	87	77	89
Warren	88	75	85
Douglas	86	72	84
Black	86	55	64
White	84	53	63
Stewart	85	49	58
Clark	88	41	47
Harlan	87	29	33

The startling fact revealed by these figures is that the Goldberg-Black Index of Interagreement was only a rather tepid sixty-four per cent. A review of the statistics for each of the three terms shows that this moderate agreement between them was largely the product of their 1964 schism. Yet, the two were less than one percentage point apart in their devout "libertarianism" during these three sessions. The cleavage between them which is indicated by their interagreement quotient had developed to such classic proportions that Goldberg's ties for the three terms to an "anti-libertarian" (White) were on an approximate par with his affinity for Black's views. A second important observation culled from these data is that Goldberg's interagreement with the two so-called "moderate libertarians" (Warren and Brennan) was even more pronounced than his three-term alliance with a fellow "arch libertarian" (Douglas). The disparity in the interagreement figures is very slight indeed, but, significantly, it is largely the product of 1964 decisions. One might hypothesize that during this last year of Goldberg's tenure on the bench, both Black *and* Douglas indulged in "libertarian" sallies which were unacceptable to his more moderate posture.

The quantification of variables is of little help in trying to assess the delicate shadings of opinion which separated Mr. Justice Goldberg from those of his colleagues who shared his "anti-authoritarian" predispositions. One must inquire into the dynamics of the so-called "libertarian bloc." Unfortunately, in the space available,

it is not feasible to do more than highlight the major strands of agreement and disagreement that seem to characterize Goldberg's relations with each of the members of this bloc.

II. GOLDBERG-BRENNAN

Statistics have told us that, of all the "libertarians," Mr. Justice Brennan most often aligned himself with Goldberg. They agreed eighty-nine per cent of the time. It is also true, however, that Goldberg was somewhat more prone to respond to alleged individual rights than was Brennan. Indeed, a review of the cases yields the interesting fact that on *no* issue did Brennan support a "libertarian" result in opposition to Goldberg's preference for a "societal" value.

The key difference between the two appears to center around the rights of the individual in the courtroom. Six of the ten issues which found them in disagreement were related to the defendant's rights in a criminal proceeding. The most dramatic instance of this divergence of opinion concerned the use of television during both a pretrial hearing and the trial itself. The petitioner was Billie Sol Estes, the Texas financier who had been found guilty of swindling. Mr. Justice Goldberg, agreeing with a majority of five,¹² voted to reverse on the ground that the use of television had "set it apart in the public mind as an extraordinary case,"¹³ and that, therefore, due process had been abridged. Mr. Justice Brennan, on the other hand, joined Mr. Justice Stewart in claiming that certiorari had been granted only to consider the question whether a judge, even during the trial of a well-known personality, could allow television facilities to be used under carefully circumscribed conditions. Justice Brennan believed the question must be answered in the affirmative.

The substance of the controversy presented in *Estes*, however, did not end there. Adhering to an argument presented by the Chief Justice in a concurring opinion, Mr. Justice Goldberg espoused the notion that under *no condition* could television be countenanced in a court of law. While some might argue that the introduction of this medium into the courtroom could serve the useful purpose of educating the public, Mr. Chief Justice Warren succinctly noted that "the function of trial is not to provide an educational experience," but to illuminate the truth.¹⁴ Justice Brennan, on the other hand, supported Justice Stewart's contention that

12. *Estes v. Texas*, 381 U.S. 532 (1965).

13. *Id.* at 538.

14. *Id.* at 575.

it was imprudent to escalate into a constitutional rule the policy determination that the use of television was unwise.

A second important case which illustrates Goldberg's desire to pioneer new constitutional ground rules for the courtroom involved Governor Ross Barnett of Mississippi. The Court held that Barnett did not have a right to a jury trial in a criminal contempt proceeding.¹⁵ Of the "libertarians," only Brennan was able to subscribe to this view. In a highly scholarly dissent, Goldberg argued that a thorough investigation of the history of criminal contempt proceedings tried before a judge made it clear that, until relatively recent times, no one had believed that non-jury procedures could ever be used to mete out anything but trivial penalties; since Barnett, if convicted, would be adjudged guilty of a most serious crime, it was proper for the Court to shield him in advance by assuring him a trial by jury.

In a somewhat novel footnote to the majority opinion in *Barnett*, Mr. Justice Clark issued the following caveat to the lower courts: don't be too harsh on this man because some members of our tribunal believe that only trivial penalties can be exacted by judges in contempt proceedings.¹⁶ It is hard to believe that Clark would have gone out of his way to announce this dictum if only Goldberg and those who shared his opinion (Warren and Douglas) adhered to this position. Quite possibly there were members of the majority who also held this view. If so, Brennan, because of his "libertarianism," is a likely suspect. This assumption, if valid, may suggest an interesting difference between Brennan and Goldberg. Brennan might well have believed that because the question of the severity of penalties issued in contempt cases had not been certified to the Supreme Court for adjudication, it was therefore the Justices' responsibility merely to issue a warning in the hope that a warning would be sufficient. This approach, of course, would afford the Court the opportunity of avoiding a most difficult constitutional question. Goldberg, on the other hand, pursued a more activist course by meeting the issue squarely so that the lower courts would be more clearly apprised of the law.

This cleavage between Goldberg and Brennan as to the application of due process considerations to criminal proceedings may be illustrated by reference to two other Supreme Court decisions. In the first of these, Goldberg went on record as opposing, except in the most pressing circumstances, the adjudication of a contempt

15. *United States v. Barnett*, 376 U.S. 681 (1964).

16. *Id.* at 695 n.12.

charge before the judge who had issued the initial citation.¹⁷ The second case involved an allegation by a Negro petitioner that no Negro had ever served on a petit jury in Talladega County, Alabama, and that this discrimination was a product of Alabama's use of the peremptory strike system to eliminate members of his race from such juries.¹⁸ A majority of the Justices, including Brennan, found that the petitioner had not satisfied his burden of proving that state officials had indeed perverted the peremptory challenge to this end. Goldberg, dissenting with Warren and Douglas, argued that once it had been shown that no Negro had ever served on a petit jury within the county, a *prima facie* case of discrimination had been established and the burden of proof therefore shifted to the state, which was "in the better position to develop the facts as to how the exclusion came about."¹⁹

It would be a mistake to emphasize these disparities in constitutional philosophy. When a concurrence level of eighty-nine per cent has been established, it should be obvious that one is dealing with two men who use the same pair of bifocals. It therefore is important to devote at least as much attention to the significant agreements between the two as to their moments of discord. Two holdings are especially useful for this purpose because they show other members of the Court moving in several divergent directions while Brennan and Goldberg stay together.

The first of these is *Jacobellis v. Ohio*.²⁰ Nico Jacobellis was convicted of showing what the courts of Ohio believed to be an obscene movie, "The Lovers." His contention was simply that the film was not obscene and that he had thus been deprived of a first amendment privilege. Two of the "libertarians," Black and Douglas, argued that allegedly obscene movies could not be proscribed by any procedures. Neither Brennan nor Goldberg could accept this sweeping approach, but they did agree that appellant's first amendment rights had been violated. In this respect, the four were joined by White, concurring in the result, and by Stewart, who wrote a separate opinion expressing his individual views.²¹ On the other hand, one "libertarian," Mr. Chief Justice Warren, joined by Justices Clark and Harlan, thought that Jacobellis could be found guilty and, in addition, drastically disagreed with the others regard-

17. *Ungar v. Sarafite*, 376 U.S. 575 (1964).

18. *Swain v. Alabama*, 380 U.S. 202 (1965).

19. *Id.* at 240. A fifth case of the same species as those discussed above is *United States v. Tateo*, 377 U.S. 463 (1964).

20. 378 U.S. 184 (1964).

21. His opinion, however, in no way represented a departure from the Goldberg-Brennan thesis presented below. See text accompanying note 23 *infra*.

ing the role of the Court in obscenity cases. Mr. Chief Justice Warren believed that the Supreme Court should not make a *de novo* review of every book or movie found by the lower courts to be obscene, but, rather, that it should invest lower courts with considerable latitude in applying the standards for obscenity which the Court had established in the *Roth* and *Alberts* decisions.²² Furthermore, it was Warren's view that when the majority in *Roth* and *Alberts* had stated that allegedly obscene works were to be evaluated in terms of "contemporary community standards," the guidelines to be used by the lower courts were the norms of each community desiring to enforce obscenity laws. To Goldberg and Brennan, each of these contentions flew in the face of the principle that "it is, after all, a national Constitution we are expounding."²³ In a nutshell, this tandem agreed that laws criminally punishing those who disseminated obscene materials were valid, that the definition of obscenity embraced national cultural values, that it was the Supreme Court's function to make a determination on its own as to the obscenity of each work questioned, and that "The Lovers" was not obscene.

Perhaps the most controversial decision of the 1964 Term was the Court's voiding of a Connecticut law which made the use of contraceptives a criminal offense.²⁴ Among the "libertarians," only Black could not accept Mr. Justice Douglas' assertion that "the First Amendment has a penumbra where privacy is protected from governmental intrusion" and that the police could not constitutionally "search the sacred precincts of marital bedrooms for telltale signs . . ." that the law had been violated.²⁵ But Goldberg, in a concurring opinion in which he was joined by Brennan and Warren, went much further than this. He stated that the due process provision of the fourteenth amendment protects personal rights which could be termed "fundamental" regardless of whether they could be buttressed by the specifics set out in the Bill of Rights. This conviction was flatly rejected by Justices Black and Douglas, who saw in this a resurrection of *Lochner v. New York*.²⁶ Finally, both Goldberg and Brennan rejected Black's and Douglas' belief that due process contained in the fourteenth amendment "incorporates" the specifics of the first eight amendments.²⁷ *Griswold*, then, like *Jacobel-*

22. *Roth v. United States*; *Alberts v. California*, 354 U.S. 476 (1957).

23. 378 U.S. at 195.

24. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

25. *Id.* at 483, 485.

26. 198 U.S. 45 (1905).

27. Mr. Justice Black's views are articulated in his dissenting opinion in *Griswold*, 381 U.S. at 507, and Mr. Justice Douglas' views are outlined in *Malloy v. Hogan*, 378 U.S. 1 (1964).

lis, illustrates the middle position that Goldberg and Brennan sometimes occupied while other members of the "libertarian bloc" split in various directions.

III. GOLDBERG-WARREN

The relationship between the value choices of the Chief Justice and Goldberg's "libertarian" commitment is very similar to the relationship between Brennan and Goldberg. Like Brennan, Warren attained a somewhat lower score (sixty-nine per cent) than Goldberg on the "liberty-authority" continuum, while exhibiting a startlingly positive concurrence ratio with Goldberg (eighty-five per cent). Warren and Goldberg disagreed on only thirteen relevant issues, with Warren being scored as favorable to a "societal" result in ten of these. However, none of the three questions on which Goldberg assumed an "anti-libertarian" position contrary to that of the Chief Justice involved major civil liberties issues. In one such case, containing two issues, petitioner had been convicted of income tax evasion through the use of evidence obtained in part pursuant to a Treasury Department policy which offered delinquent taxpayers the option of escaping criminal prosecution by freely disclosing their violations.²⁸ While the evidence clearly indicated that the taxpayer had confessed only so as to perpetrate a fraud on federal officials, Justices Warren, Douglas, and Black, arguing that the admission of guilt had been induced, believed that the use of this information violated the self-incrimination provision of the fifth amendment. To the majority, including Goldberg, petitioner's confession was not only voluntary, but was also calculated to undermine the basic purpose of the program—the avoidance of criminal penalties. Moreover, the majority rejected the minority's contention that subsequently discovered inaccuracies in the testimony of an important trial witness would necessarily entitle the defendant to a new trial, especially since no allegation had been made that the witness had committed perjury.

The second decision in which Warren took a more "libertarian" approach than Goldberg raised the question of probable cause for a search warrant.²⁹ Speaking for a majority of seven which upheld the warrant, Goldberg noted that the warrant used the phrases "upon observations made by me" and "upon personal knowledge" in designating some of the sources of the incriminating information.³⁰ Warren, dissenting with Douglas, tried to show that, taken

28. *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963).

29. *United States v. Ventresca*, 380 U.S. 102 (1965).

30. *Id.* at 110.

as a whole, the warrant was a tissue of hearsay because no particular item of information was identified as within the first-hand knowledge of the officer. To Goldberg, this was a mechanical reading of the warrant; hearsay might well serve as the basis for establishing probable cause if the circumstances so required.

What are the issues on which Goldberg and Warren disagreed, with Goldberg cast in the role of a civil liberties advocate? Of the ten constitutional questions, six involved the right of free speech. The most drastic split between Goldberg and Warren stemmed from their conceptions of the role of the Supreme Court in dealing with the suppression of obscenity. *Jacobellis* contained three of the six first amendment issues which found Goldberg and the Chief Justice on opposite sides. A strong sense of the pragmatic runs through Warren's dissent in this case: What criteria, he asked, can the Court use to enunciate a set of national moral standards? How can the Justices expect local courts to divine these guidelines? How can the Supreme Court institute a de novo review of every piece of alleged smut that lower courts believe to be proscribable under *Roth-Alberts*? Who are nine men to say that a movie which contains an implication of mouth-genital sexual gratification is not obscene?³¹ Goldberg, on the other hand, placed emphasis on the concept of free speech as a national constitutional privilege which protects all Americans no matter where they live. If it is to be the responsibility of the Supreme Court to define obscenity, he said, then the Justices could not simply lay down a formula and let the states act as administrative agencies in their application of that formula. Free speech is too pre-eminent a value in our system to allow such latitude.

This priority given to free speech when it is weighed against the government's alleged responsibility to protect the public against deleterious consequences of speech is again illustrated in the Goldberg-Warren cleavage over the constitutionality of state laws dealing with libel suits. It was Goldberg's belief that a public official could not recover damages from a private citizen who had libeled him, no matter how malicious the intent of the speaker.³² To allow recovery, he felt, would be to place the prerogatives of public criticism in the hands of "a jury's evaluation of the speaker's state of mind."³³ It followed from this that a state law which branded the libeling of a

31. For some relevant comments on the travails of "The Lovers" before various motion picture censor boards, see CARMEN, MOVIES, CENSORSHIP AND THE LAW 87, 192, 268, 283 (1966).

32. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

33. *Id.* at 300.

public official a crime was also unconstitutional even as applied to a person who knew his statement to be false.³⁴ The Chief Justice believed that a state might well determine that "the use of the known lie as a tool is at once at odds with the premises of democratic government," and that "calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"³⁵ This is precisely the kind of argument that Goldberg had espoused in his split with Black and Douglas over a state's right to suppress obscenity. It is extremely important to note that Goldberg would give citizens greater leeway in criticizing public officers than he would give the writer or filmmaker in exploring man's sex life.

The final case which shows Goldberg and Warren on opposite sides on matters of first amendment coverage stemmed from a State Department order refusing to allow a citizen to travel to Cuba to inspect for himself the ways in which Fidel Castro was leading his people toward "social justice."³⁶ It is true, Warren wrote for the majority, that there are few inhibitions on travel which would not decrease one's access to knowledge; nonetheless, the Chief Executive, through his agent, might reasonably find in this instance that the United States policy of quarantine toward Cuba would be better enforced if inquisitive Americans confined their inquiries to newspaper reading. In dissent, Goldberg pointed out that, if the State Department could keep Americans from going to Cuba because of its communist ties, it could, on similar grounds, also keep them from going to any other communist state. Given the fact that the right to travel is an essential attribute of free speech, a more definite showing of a national emergency would be necessary to justify this restriction of an individual's right to obtain information.

Despite their differences, both Goldberg and Warren accepted the "libertarian" ideology, and this created a bond between them which was as important as the bond between Goldberg and Brennan. In *Griswold*, for example, Goldberg, Warren, and Brennan joined hands not only in widening the first amendment's new-found protection of privacy rights, but also in the view that the due process clause of the fourteenth amendment could be used to strike down governmental infringements of personal liberties that were thought to "shock the conscience" of our collective citizenry, as perceived

34. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

35. *Id.* at 75.

36. *Zemel v. Rusk*, 381 U.S. 1 (1965).

by the Justices. Moreover, Warren joined forces with Goldberg more often than not in resisting Brennan's "societal" tendencies in cases dealing with the courtroom protections to be afforded the accused. For example, the Chief Justice chose a "libertarian" posture in deciding the questions tendered to the Court in *Estes* and in the determination of the jury discrimination question presented in *Swain*. In addition, he concurred in Goldberg's trenchant defense of Ross Barnett's right to a trial by jury, but, also in accord with Goldberg's arguments, he resisted the Black-Douglas notion that not even trivial penalties could be assessed by a judge in criminal contempt proceedings. This increasingly close relationship between Goldberg and Warren was best illustrated in the 1964 Term when the Justices resolved twenty-three issues which found the "libertarians" at odds with one another. Of these, Goldberg concurred with the Chief Justice in all but three, and with Brennan in all but five. As has already been intimated, then, the somewhat more intense civil libertarian predispositions which influenced Goldberg when contrasted with Brennan and Warren constituted but a minor schism when compared with the major discord which appeared to exist between Goldberg and both Black and Douglas.

IV. GOLDBERG-DOUGLAS

Mr. Justice Douglas established himself as the "libertarian par excellence" of the 1962-64 period. He voted against the use of society's powers to order the actions of its people in ninety-one per cent of the pertinent constitutional questions litigated before the Court during those years, putting him well above Goldberg's second-place seventy-eight per cent. Indeed, Douglas' commitment to the personal rights of the individual placed him ahead of all of his colleagues in *each* of these three terms.

The interagreement quotient between Goldberg and Douglas during this time was an intense eighty-four per cent. This ratio, however, ranks only third in Mr. Justice Goldberg's hierarchy of agreement with the other "libertarian" Justices. While Goldberg's civil liberties inclinations, in terms of percentages, placed him as distant from Douglas as he was from Warren and Brennan, an analysis of the data on a term-by-term basis reveals some interesting facts. Goldberg's affinity for Douglas' ideological views shows a sharp falling off during the 1964 Term. From a remarkable concurrence ratio of ninety-three per cent in the 1963 session, their interagreement quotient plummeted to a still significantly positive

seventy-four per cent one year later. On the other hand, Goldberg's concurrence with Warren jumped from seventy-nine to ninety per cent during the same period of time. Furthermore, Goldberg's and Douglas' adherence to civil liberties values also shows some inter-term fluctuation; the 1964 Term, for example, found the spread between them to be a surprisingly wide twenty percentage points.

It is submitted that there is no single class of controversies that accounts for whatever disparities exist in their "libertarian" attitudes. Throughout Goldberg's first two years as a Supreme Court Justice, he and Douglas parted company in their interpretation of constitutional rights of the individual on only five occasions. It has been noted that, in *Barnett*, Douglas wanted to divest judges of all power to mete out penalties in criminal contempt cases.³⁷ It was also his belief that no movie could be suppressed merely because it was thought to be obscene.³⁸ Furthermore, Douglas was the only member of the Court who felt that a Sunday closing law exempting from its applicability those who keep another day as their Sabbath could be challenged on first amendment grounds.³⁹ On the other hand, as an example of their agreement during the 1962 and 1963 Terms, Goldberg and Douglas joined alone in dissent (the only occasion on which this occurred in the cases coded) to protest the manner in which district lines for the House of Representatives were allegedly gerrymandered in New York City.⁴⁰ It was their opinion that the state legislature had used race as a guideline so that Harlem would have its own representative, and that this contravened the principle of equal protection. Nor can it be forgotten that it was Goldberg and Douglas, joined only by Warren, who found segregation of the races by privately owned "public accommodations" to be prohibited by the fourteenth amendment.⁴¹

During the 1964 Term, however, Justices Goldberg and Douglas disagreed in eight of the thirty-three decisions in which they jointly participated. In the more important of these disagreements, it appeared that Goldberg usually was unwilling to follow Douglas in the latter's determination to apply rules of law to varying kinds of conduct regardless of the circumstances. In *Freedman v. Maryland*,⁴² for instance, Douglas espoused the notion that movies are entitled to be as free from the yoke of the censor as are any of the other mass

37. It is true that Douglas joined with Goldberg in his dissenting opinion, but he also concurred in Black's more "libertarian" protest.

38. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

39. *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218 (1962).

40. *Wright v. Rockefeller*, 376 U.S. 52 (1964).

41. *Bell v. Maryland*, 378 U.S. 226 (1964).

42. 380 U.S. 51 (1965).

media. Thus, he said, "I would put an end to all forms and types of censorship"⁴³ Goldberg, however, evidently believing that motion pictures presented special problems which are not inherent in the dissemination of the written word, took the position that a limited form of censorship circumscribed by the guarantees of due process could be constitutionally upheld. With respect to the guarantees of the fourth amendment, Douglas and Black dissented against the majority's holding that the *Mapp* rule⁴⁴ did not operate retrospectively upon cases that had been finalized prior to the Court's decision in *Mapp*.⁴⁵ The consensus among the majority Justices, including Mr. Justice Goldberg, was that there was no all-embracing principle of retroactivity even as to the application of the Bill of Rights, but that emphasis must be placed on matters of "public policy" and "a consideration of 'particular relations . . . and particular conduct'"⁴⁶ There was surely a substantial difference between applying retrospectively an expansion of the right to counsel, where the availability of legal counsel could have meant the difference between conviction and acquittal, and the *Mapp* rule, the retroactive application of which would free thousands of known guilty parties. To Douglas, such a distinction was "more like law-making than construing the Constitution,"⁴⁷ and indicated "a disparaging view" of fourth amendment liberties.⁴⁸

Two other controversies are also illustrative of the Goldberg-Douglas cleavage. The first involved the question whether the "one man-one vote" principle of apportionment necessitated the use of single-member districts.⁴⁹ Eight members of the Court voted to uphold a system by which seats in a state legislature were apportioned among counties according to population, but in which all the law-makers coming from multi-district counties were to be chosen by a county-wide vote. Douglas, on the other hand, thought this to be an "invidious discrimination" because a person living in a district contained in a populous county had to share his vote with all members of the county, while one living in a sparsely settled county voted only for a single-district representative. To put Douglas' argument succinctly: an apportionment system could not use homesite as a criterion for varying schemes of representation.

In the second illustrative decision, the Court unanimously

43. *Id.* at 62.

44. *Mapp v. Ohio*, 367 U.S. 643 (1961).

45. *Linkletter v. Walker*, 381 U.S. 618 (1965); *Angelet v. Fay*, 381 U.S. 654 (1965).

46. *Linkletter v. Walker*, *supra* note 45, at 627.

47. *Id.* at 649.

48. *Id.* at 645.

49. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

voided a Florida statute making it a crime for an unmarried couple to occupy habitually the same room in the nighttime if one was Negro and the other Caucasian.⁵⁰ This, said Mr. Justice White, was an irrational classification in light of the demands of the equal protection clause. If his opinion had said nothing more, there would have been no cause for disagreement. But White found it necessary to point out that not all laws using race as a criterion for determining state regulatory policies were invalid; such laws would be upheld if found to be "necessary" to "the accomplishment of a permissible state policy."⁵¹ This last statement rankled Justices Douglas and Stewart. What valid legislative act, they asked, could be passed pursuant to the fourteenth amendment which would make the color of a man's skin a standard of criminal conduct? Until this time, Goldberg's policy notions had led him to oppose any public action that even smacked of racism, as is evidenced by his dissents in the Harlem district case and in the Alabama peremptory challenge decision. Why then did he not concur in Douglas' "libertarian" foray? No one, of course, can say for certain, but the general trend of Goldberg's decisions during this period leads one to believe that he was beginning to chafe ever so slightly against the idea that a civil right is *always* a right no matter what claims society makes upon its citizenry. To be more specific, it is quite possible that Goldberg saw Douglas' argument as an attack on such precedents as the Japanese exclusion cases.⁵²

One of the decisions of the Court that requires close examination as one considers the variations in recent judicial behavior is *Griswold v. Connecticut*;⁵³ few cases seem to tell us as much about each of the Justices. In writing his opinion for the majority, Douglas denounced the role of the Supreme Court as a "super-legislature." It is not the task of the Court, he said, to assess "the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."⁵⁴ It was this Holmesian expression of self-restraint which led Goldberg to proclaim, for the first and only time, a "libertarian" commitment contrary to Douglas' convictions. For the latter, due process guaranteed no substantive rights other than those derived from a particular right set out in the first eight amendments. For Goldberg, the "liberty of contract" once thought to be guaranteed by substantive due process was undoubtedly obso-

50. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

51. *Id.* at 196.

52. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

53. 381 U.S. 479 (1965).

54. *Id.* at 482.

lete, just as it was for Douglas; but Goldberg did not construe this to mean that due process could be characterized in a substantive sense so as to encompass *only* those personal liberties set out in the Bill of Rights. It was this conviction which led him to embark on his famous journey into the ninth amendment "thicket" in order to prove his point. It is possible that this resort to a constitutional clause long thought to have been interred was not Goldberg's finest hour on the Court, but it did demonstrate his displeasure with the idea that due process is only shorthand for the Bill of Rights.

V. GOLDBERG-BLACK

Our data indicates that the divergence of opinion between Goldberg and Black should provide the keenest insight into the dynamics of Goldberg's civil liberties predispositions while a member of the Supreme Court. No one can doubt that Goldberg and Black were equally intense in their determination to rescue the individual from alleged infringements of personal rights. Statistics show that each scored seventy-eight per cent in his "libertarian" responses over the three-term period. Furthermore, their near congruence was all the more amazing when examined on a term-by-term basis. During each of the three sessions that Goldberg sat on the bench, his "libertarianism" never varied from Black's by more than four percentage points. Indeed, when Black's "anti-societal" tendencies suffered a radical falling-off during the 1964 Term, a similar change was evident in Goldberg's policy choices.

It has already been noted, however, that the interagreement ratios for these two men were not marked by such congruence. After an interagreement quotient of eighty-three per cent in 1962, the two disagreed on ten separate issues during the 1963 Term for a "moderate" cohesiveness of sixty-seven per cent, compared to the Goldberg-Warren alliance of seventy-nine per cent and the Goldberg-Douglas quotient of ninety-three. This rate of dissatisfaction was merely a precursor of the events of the 1964 Term, when Goldberg disagreed with Black more often than with any of his brethren. As a matter of fact, their interagreement score was an insignificant forty-seven per cent, compared with a seventy-four per cent agreement between Goldberg and Douglas and the even higher percentages Goldberg attained with Brennan and Warren.

There were two cases decided during the 1962 Term which help to establish a significant disparity in thinking between Black and Goldberg. Each case involved alleged invasions of fourth amend-

ment freedoms. In the first of these,⁵⁵ a federal officer with a minifon hidden on his person recorded a bribe offer made to him, and this evidence was then used to convict the speaker. The majority, with Black concurring, affirmed the conviction. In dissent, Justices Goldberg, Brennan, and Douglas argued that electronic devices, because of the serious intrusion they make into rights of privacy, should be subject to the fourth amendment limitations on unreasonable searches and seizures. Unless warrants were required in these cases, the dissenters claimed, the individual would have no protection against invasions by third parties whose presence could never be determined.

In the second case,⁵⁶ California police officers, acting without a warrant, used a passkey to enter petitioner's apartment, arrested him on suspicion of violating narcotics laws, and subsequently discovered marijuana on the premises. A majority of five, including Black, found that probable cause existed for making the arrest and the ensuing search without a warrant because incriminating statements had been made by informers and also because the police had observed several of petitioner's associates dealing in marijuana. According to the majority, there was not an illegal "breaking" without notice, for the police were reasonably certain that the petitioner had been apprised of their surveillance and might well conceal or destroy the incriminating evidence if they did not act immediately. To Mr. Justice Goldberg and the other "libertarians," this was an "unannounced police intrusion into a private home." There was nothing in the record to show that the petitioner was about to destroy the evidence in his possession because it was not clear that the petitioner knew that the police were following him. Indeed, if police actions in the instant case could be justified by the mere possibility, supposedly based on experience, that evidence would be destroyed, the police could break into a suspect's home practically at their whim.

The Justices were called upon to construe the scope of fourth amendment protections in only three other controversies during the subsequent two terms.⁵⁷ In each of these cases, Black rejected what he conceived to be an overly broad view of these liberties.⁵⁸ In the only one of these cases in which Black and Goldberg agreed,

55. *Lopez v. United States*, 373 U.S. 427 (1963).

56. *Ker v. California*, 374 U.S. 23 (1963).

57. This figure excludes *Linkletter and Angelet*, which involved the retroactivity of already established constitutional rights.

58. *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Ventresca*, 380 U.S. 102 (1965); *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

they joined the Court in upholding a search warrant based partially on hearsay because there was some evidence that the officer who had obtained the warrant possessed sufficient first-hand knowledge to verify the hearsay.⁵⁹ Unfortunately, because Mr. Justice Black concurred silently in all five of these search and seizure cases, no overt explication can be found in any decision rendered during these terms which helps us to understand why Black, the staunch civil liberties advocate, had been content with the use of electronic devices to obtain evidence and the use of hearsay to establish probable cause for arrests and searches.

Offsetting Black's "pro-societal" inclinations in the fourth amendment cases was his uniquely "libertarian" orientation regarding the rights of the accused in criminal proceedings. The primary example of this orientation is *Jackson v. Denno*,⁶⁰ in which a five-man majority, including all of Black's "libertarian" brethren, held that a jury entrusted with the power to decide innocence or guilt could not also be permitted to determine the voluntariness of the defendant's confession. Such a rule was required because there was a serious threat that "matters pertaining to the defendant's guilt will infect the jury's finding of fact bearing upon voluntariness. . . ."⁶¹ In addition, even if the jury disregarded the confession because of coercion, one could hardly expect this same panel to suppress the fact that the accused had, in reality, confessed. The Court's decision contravened Black's devotion to the concept of trial by jury. This new doctrine, he believed, seriously undercut the Founding Fathers' abiding faith in the jury as the institution best equipped to decide factual questions. However, despite his passion for the jury system, Black still considered it the duty of reviewing courts to examine the record and decide for themselves if confessions had been obtained by illegal techniques. In the case at hand, he felt that due process had been clearly violated by police officials, whereas the majority had refused to consider the factual question of voluntariness.

The 1964 Term also contained a controversy which saw Black split from his "libertarian" colleagues on somewhat similar grounds.⁶² In affirming a conviction for operating an illegal distillery, the Court upheld a federal statute establishing a presumption of guilt if an accused could not explain his presence at such a distillery. Speaking for himself and six others, Justice Stewart found that this portion of the law had been drafted because of the practical

59. *United States v. Ventresca*, *supra* note 58.

60. 378 U.S. 368 (1964).

61. *Id.* at 383.

62. *United States v. Gainey*, 380 U.S. 63 (1965).

difficulties inherent in proving actual participation in the illegal conduct. It was his view that considerable weight must be accorded Congress in drawing conclusions from the behavior of individuals, and that the "rationality of the connection 'between the fact proved and the ultimate fact assumed'" was beyond doubt.⁶³ However, Stewart did emphasize that if guilt had not been demonstrated beyond a reasonable doubt, a jury need not convict even if an accused's presence went unexplained. Black, the lone dissenter, stated that federal officials had violated petitioner's right of trial by jury and the guarantee of due process of law. In our constitutional system, the jury's function as the sole judge of facts in criminal cases could not be undermined by presumptions established by Congress. But, even if Congress had the law-making capacity to create presumptions of guilt, it still did not follow that consistent with the guarantee of due process, the mere unexplained presence at a still, in and of itself, necessarily constituted sufficient grounds for guilt.⁶⁴

The issue which seems to exemplify best Black's and Goldberg's divergent notions of "libertarianism" was the question in *Bell v. Maryland*⁶⁵ whether racial segregation in privately owned public accommodations violated the equal protection clause. The resolution of the constitutional question presented in this case was obviously very important for the entire country, but perhaps equally important was that it may well have had an incalculable impact upon the future of "libertarianism" on the Court.

Petitioners had been found guilty in the courts of Maryland for trespassing upon the premises of a restaurant which served whites only. After their request for relief had been denied by the Maryland Court of Appeals, but before certiorari was granted, the state legislature passed a public accommodations statute making it obligatory for owners of these establishments to serve members of all races on an equal basis. By a vote of six to three, the Justices reversed the convictions, relying on the newly enacted state law despite Maryland's general saving clause which was designed to protect state convictions from the common-law effect of supervening statutes.

Four members of the Court refused to accept this conclusion. Mr. Justice Douglas, concurring separately, found that Maryland had made reference to the new law only to show why certiorari ought not to be granted; furthermore, the issue of the state legisla-

63. *Id.* at 66.

64. Two other decisions of the same genre which found Black at odds with Goldberg were *United States v. Barnett*, 376 U.S. 681 (1964), where Black opposed the meting out of any penalties by judges in criminal contempt proceedings, and *Boles v. Stevenson*, 379 U.S. 43 (1964).

65. 378 U.S. 226 (1964).

tion had been shunted aside during oral argument and conferences because it was felt to have been frivolous. He then went on to find the "apartheid" inherent in racial exclusion policies of public accommodations owners to be contrary to the fourteenth amendment.

Mr. Justice Black, on the other hand, speaking for himself and Justices White and Harlan, agreed that the Court had made a grievous error in not facing the equal protection problem squarely, but reached a different conclusion than did Douglas. Referring first to the matter of state action, he said that everyone agreed that a state could not use its power to foist second-class rights on any race. But the Maryland courts had not done this by merely enforcing the restaurant owner's prejudices against serving Negroes. As for cases like *Shelley v. Kraemer*,⁶⁶ where the Justices had found court enforced restrictive covenants to be unconstitutional state action, Black claimed that, in reality, the Court had done nothing more than protect federal rights guaranteed by the Civil Rights Acts of 1866 and 1870. And, although the restaurant was licensed by the city, the licensing involved no attempt to force policies of segregation upon property owners. Secondly, responding to the argument that, irrespective of state involvement, the fourteenth amendment was applicable to privately owned businesses which hold themselves out to the public, Black merely noted that the Court ought not to overthrow a veritable host of precedents that had been decided to the contrary. It is at this point that his opinion is most balanced and perceptive. Legislative bodies, subject to the influence of public debate, could draw the lines necessary to set apart those private activities so wrapped up in public service that they ought to be open to all regardless of race. However, if the Court were to lay down an inflexible constitutional rule on the subject, then the Congress and state legislatures would be prevented from participating in the formulation of these policies.

Of the five Justices who believed the passage of the new Maryland law to be sufficient grounds for reversal, only Goldberg and Warren found it necessary to comment on the fourteenth amendment argument. In so doing, they joined Douglas in his opposition to Black's contentions. To Goldberg, Black's position would bind the Negro to a vestige of slavery which imposed upon him the limitations of a caste system. Goldberg inquired into the history of the fourteenth amendment and concluded that its framers had intended to provide Negroes with all the civil rights guaranteed to Caucasians. Furthermore, it could not be said that petitioner was attempting to

66. 334 U.S. 1 (1948).

exercise a "social" rather than a "civil" right, because the *raison d'être* of segregated facilities did not lie in the implementation of a property owner's personal biases, but, rather, resulted from his determination to maximize profits. In concluding, Goldberg noted that, no matter what the writers of this amendment intended, Black's convictions could not be squared with the school integration decisions which had shown racial segregation to be harmful to the Negro as he attempted to improve his condition in our modern society.

The impeccable dispassion of these opinions tends to obscure the emotionally charged background of *Bell v. Maryland*. Southern states were wracked with picketing, rioting, and even racial murders. Sit-ins had become commonplace. The Senate was stalemated in filibuster over the President's civil rights proposal. The Court was faced with the question: what role should it play in resolving the controversy? Although the premise of "libertarianism" is action on behalf of alleged constitutional rights of the individual, Justice Black, normally "libertarian," had taken an "authoritarian" stance in this situation of crisis. What impact this shift may have had on Goldberg and Black as ideological brethren can, perhaps, never be known; yet, one thing is clear: the 1964 Term saw Goldberg move further from Black than from any of his other colleagues.

The class of cases which, not surprisingly, appears to demonstrate best the intensity of the differences between Black and Goldberg involved the alleged civil rights of Negroes. Mr. Justice Black had shown at an early time that he was not as willing as Goldberg to cut through a mass of contradictory evidence in order to conclude that race was used as a criterion for legislation or other state action and that, therefore, such action was invalid.⁶⁷ In two cases decided the same day as *Bell*, Black refused to join his "libertarian" friends in finding that the due process clause protected petitioners against a state court judgment applying a trespass law retroactively so as to make it applicable to their conduct,⁶⁸ and in ruling that a deputy sheriff hired in a private capacity to enforce segregation was engaged in unconstitutional state action.⁶⁹ And, in two cases decided during the 1964 Term, Black rejected both Goldberg's contention that an Alabama county had perverted its peremptory jury challenge rule so as to screen out Negroes,⁷⁰ and Goldberg's position in *Cox v. Louisiana*⁷¹ that city officials had duped civil rights picket-

67. *Wright v. Rockefeller*, 376 U.S. 52 (1964).

68. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

69. *Griffin v. Maryland*, 378 U.S. 130 (1964).

70. *Swain v. Alabama*, 380 U.S. 202 (1965).

71. 379 U.S. 536 (1965).

ers, contrary to due process, by telling them that they could legally demonstrate and subsequently arresting them under a law forbidding disturbances in front of courthouses. Of course, there were issues involving the rights of Negroes where Black reached a "libertarian" result,⁷² but his overall approach to these matters was that of a Harlan, not that of a Goldberg.

There was another key difference in constitutional philosophy between Justices Goldberg and Black that was made evident in 1964 and 1965. When Goldberg believed the rights of the individual to be in jeopardy, he was often more than willing to dispel precedent to guarantee those rights. Both *Barnett* and *Bell* attest to this. On the other hand, Black, like Douglas, could trace his roots, in so far as judicial philosophy is concerned, to the 1930's when he saw the power of the Supreme Court used to strike down legislation which the Court believed to be radical or unwise. As a New Dealer, he knew that judicial activism has its dangers as well as its blessings. When Goldberg formulated an expansive interpretation of due process to strike down Connecticut's statute forbidding the use of contraceptives, Black disagreed strongly. It was not for the courts to invalidate laws which were believed to be "arbitrary, capricious, unreasonable, or oppressive"; such formulas were based on "natural justice," and it was for legislatures, not for the Supreme Court, to apply "natural justice."⁷³ This same basis for disagreement appeared earlier, in *Jackson v. Denno*, when Black accused his "libertarian" brethren, among others, of scrapping New York's jury procedures for determining the admissibility of confessions because such procedures were deemed to be unfair. He stated:

The Court appears to follow a judicial philosophy which has relied on that clause [due process] to strike down laws and procedures in many fields because of a judicial belief that they are "unfair," are contrary to "the concept of ordered liberty," "shock the conscience" or come within various other vague but appealing catch phrases.⁷⁴

Again, in a lone dissent in *Plymouth Sedan*, he chastized his colleagues for grafting the exclusionary rule onto the fourth amendment: "I cannot agree that because we ourselves might believe the practice of obtaining evidence in that manner 'shocks the conscience' or is 'shabby' . . . we are . . . authorized by the Constitution to prevent its use as evidence."⁷⁵

72. Black concurred in the reversal of the breach of peace and obstructing public passage convictions in *Cox v. Louisiana*, *supra* note 71.

73. *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965).

74. 378 U.S. 368, 407 (1964).

75. 380 U.S. 693, 703 (1965).

Yet if Black were persuaded that the Constitution granted a particular civil liberty to the individual, he was far more willing than Goldberg to expand the application of that liberty. The most powerful example of this tendency was his advocacy of the "incorporation" of all of the Bill of Rights into the fourteenth amendment. This notion was specifically rejected by Goldberg in *Griswold*. There is a strain in Black's thinking which places an almost naive trust in the Founding Fathers; a belief that they set up a code of political values for the individual which, if protected through a literal interpretation of the Constitution, will provide the individual with all of the liberties he will ever need. Goldberg's view of the judicial power was more elastic, for it was based upon the premise that concepts like due process are not static and that dangers emanating from arbitrary state power can be so subtle and so ingenious as to be unforeseeable by the most forward looking of men.

VI. CONCLUSION

This article has attempted to capture one aspect of a Supreme Court Justice's total value system. To make this possible it has been necessary to stress both the man's individual notions of judicial policy-making and his ideological ties with the eight other men who together had to decide the pressing legal controversies presented during his stay on the Court. Surely this bifaceted approach is mandatory; all of us are members of groups and responsive to their norms and the beliefs of their leaders, while, at the same time, each must live with the standards of conduct he has established for himself.

Each of these tasks has required a somewhat different tool of analysis. Goldberg's adherence to a so-called "libertarian bloc" has been brought out through the use of as much quantitative data as could be extracted from Supreme Court decisions. On the other hand, the subtleties of his value orientation can be explained only by qualitatively assessing the major strands of his commitment in relation to the beliefs of his colleagues. The choice of techniques has been entirely pragmatic. Quantitative methods provide a certain rigor and clarity which qualitative approaches cannot match; but they are useless if they do not measure reliably the choices with which decision-makers are faced. Furthermore, it is obvious that computers cannot tell us very much about the real differences of opinion between people. It is true they are able to determine that Goldberg agreed more often with Brennan than with Black. They can also identify the classes of cases where disputes were most prev-

alent. But they cannot provide edification as to whether one disagreement is more important than eight agreements, nor can they tell us whether a category of disagreements has any greater implications in describing and characterizing the attitudes of Justices than are plainly evident from the cases themselves. •

Keeping in mind, then, the respective roles of qualitative and quantitative analysis in interpreting our data, an examination of all that has gone before yields the conclusion that Goldberg, while a "libertarian," was closer in his commitment to the credo to Brennan and Warren than he was to Douglas and Black. To be sure, his disagreements with Brennan and Warren are significant to the student of constitutional law, but, generally speaking, they are confined to discrete classes of litigation. On the other hand, his antagonism toward the civil liberties postures of Douglas and Black is often so basic as to cut across several categories and, thus, to reach the level of philosophical disharmony.

In a sense, the differences between Goldberg and Douglas constitute a small, but meaningful, illustration of the divergent outlooks one might often expect to find among Justices even if the liberty-authority continuum under investigation is one-dimensional. In other words, we may assume that all Supreme Court members would have somewhat varying conceptions of how best to balance a citizen's community obligations with his individual rights even if there were general agreement as to what correlative obligations and rights were most appropriate for our society at a given time. These differences in view would range from the trivial to the widespread, from the random to the consistent. That the liberty-authority continuum for the Court tended toward unidimensionality is evidenced by the fact that there is a near congruence between Goldberg's ideological adherents and the "libertarians" with whom he typically joined in decision-making. In the case of Goldberg and Douglas, the best evidence that there is only one level of tension at work is the fact that Douglas, with the exception of *Griswold v. Connecticut*, always weighted the scales of policy-making in favor of personal rights as heavily as did Goldberg; indeed, in a wide variety of significant cases, he managed to go even further.

When we examine the Goldberg-Black relationship, however, the utility of the liberty-authority continuum decreases considerably. Obviously, this concept is no more accurate a description of the relationship between Goldberg and Black than would be a description of American politics in terms of a struggle between activists and restrainers, liberals and conservatives, or relativists and absolutists.

Rather, Black and Goldberg are individuals who accept the primacy of "libertarian" values, but who in large measure cannot concur on the nature of the component parts of the "libertarian" system or on the interrelationship of those parts.

Finally, there is one other thing that numbers cannot do, and that is to assess normatively the values of the Justices. No one would argue this point. This article offers no judgment, considered or otherwise, as to whether Mr. Justice Goldberg's jurisprudence was better than that of any or all of his brethren. Such an evaluation must wait for another day. It is to be hoped, however, that in terms of the "liberty-society" alternative presented here, all of the data one will need in order to make this assessment have been gathered and presented.

APPENDIX A

NOTES ON METHODOLOGY

There has been some disagreement among scholars as to the most feasible means by which one can make use of Supreme Court decisions to demonstrate empirically voting patterns among Justices. The basic controversy appears to center around the question whether one is trying, or should be trying, to measure issues or votes. C. Herman Pritchett, who initially demonstrated the fruitfulness of empirical analysis of Supreme Court decision-making, seemed to advocate the former approach.¹ He coded the policy preferences of Justices only in non-unanimous, formal opinions appearing in the first section of the *United States Reports*, including "per curiams reported in the same manner as full opinions."² Furthermore, he counted opinions, not cases,³ so that several cases decided by one opinion were counted together as one.⁴ It follows that one dissent applicable to more than one formal opinion was probably treated as a single dissent rather than as two (or more) negative votes.⁵ Finally, Pritchett evaluated certain concurrences as dissents depending upon whether the cleavage represented "a fundamental diver-

1. His landmark studies are PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* (1954) [hereinafter cited as *CIVIL LIBERTIES*]; and PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1948) [hereinafter cited as *THE ROOSEVELT COURT*].

2. *CIVIL LIBERTIES* at 257 n.39.

3. *THE ROOSEVELT COURT* at 289 n.2.

4. However, companion cases requiring opinions of their own, no matter how brief, were individually included in his sample.

5. This is Schubert's conclusion. See SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 164 (1959). My understanding (though not my evaluation) of Pritchett's quantitative methodology is predicated in some measure on Schubert's earlier research. See *id.* at 78-80, 164-66.

gence in judicial attitude from that of the majority [opinion],"⁶ and, evidently, coded two Justices as agreeing in dissent only when they signed the same opinion.⁷ The Pritchett approach in quantitatively examining the civil libertarian attitudes of Justices appears to be essentially this: Inspect the facts of each opinion to see if a due process, free speech, or similar claim is involved, read the case, and then code each participant depending upon his approval or disapproval of the claim. Any voting bloc which emerges will be the function of the Justice's "libertarian" sentiments and their perceptions of the Court's role as a decision-maker in our society.⁸

Glendon Schubert's use of bloc analysis differs radically from Pritchett's.⁹ Pritchett's technique, Schubert believes, is feasible only for determining the power structure and strength of conflicting factions on the Court. The investigation of judicial attitudes toward issues can better be conducted through scalogram and factor analysis. The result is that Schubert counts votes, not opinions. All cases stand on their own because "the underlying assumption is that each justice makes a separate decision in each case. . . ."¹⁰ Obviously all concurrences must be coded as agreements with the majority, while all dissenters are considered allies.

To the extent that the present investigation relies on content analysis, it is surely closer to Pritchett's orientation than to the Schubert approach. Still, some of Pritchett's methodological notions were deemed inappropriate to this study. No decision was included unless it presented some unique constitutional issue. The purpose for so limiting the sample was to prevent the data from becoming stilted through the inclusion of duplicate items. Pritchett recognized this problem as crucial when he stated: "[counting such decisions] does result in giving multiple weight to alignments on a single issue arising out of almost identical factual situations."¹¹ Nevertheless, Pritchett counted all cases of a particular genre whether or not they were unique. Another difference between Pritchett's methods and those used in this study is that, in this investigation, Justices are sometimes coded as "libertarian" or "non-libertarian" allies irrespective of whether they overtly concurred in one another's opinions.

A special attempt has been made here to isolate the several conflicting strains of "libertarian" ideology contained within a single

6. THE ROOSEVELT COURT at 289 n.2.

7. "In such cases [where colleagues join in opposition for different reasons] the dissenting justices may need to be shown as disagreeing with the majority but also as disagreeing with the other dissenters." CIVIL LIBERTIES at 275 n.1 (ch. IX); see SCHUBERT, *op. cit. supra* note 5, at 165.

8. CIVIL LIBERTIES at 186-92.

9. See SCHUBERT, *op. cit. supra* note 5, ch. III.

10. *Id.* at 79.

11. CIVIL LIBERTIES at 274-75 n.1.

decision. Under the techniques developed by Pritchett for measuring adherence to an ideology, a case such as *Quantity of Books* would be treated merely as a free speech controversy, with seven Justices coded as having supported plaintiff's allegations while the minority of two would be classified as being opposed to the claim.¹² With due deference, this system of scoring tells us almost nothing about the marrow of constitutional doctrine at stake in this controversy. The approach utilized here also avoids the use of Guttman scaling analysis, which Schubert believes to be adequate for the testing of the civil libertarian notions of the Justices. Yet, in explaining his theory, Schubert states: "The justices respond, not by the words they use in their Opinions, but by the *ways in which they vote*."¹³ Thus, Schubert would deal with *Quantity of Books* just as Pritchett would, throwing it into the "free speech hopper" and coding it as a seven to two "libertarian" judgment. To the author's knowledge, all previously published studies involving cumulative scaling of Supreme Court decisions in civil liberties cases suffer from this drawback.¹⁴

There are two criticisms of the scaling approach to quantifying judicial decision-making that some might find applicable to the methods adopted in this study. Becker, in a recent publication, has disputed the argument lodged by Schubert and Harold Spaeth that scaling can account for the "attitudes" of Justices.¹⁵ After all, he claims, votes are only votes and what they mean in terms of causal relations cannot be verified empirically merely by arranging the votes in some order. While Becker's point is well taken, it cannot be said to be relevant to a quantitative approach that gauges overtly stated attitudes themselves. A closely related, but somewhat different, criticism comes from Joel Grossman. He questions Ulmer's (and, necessarily, Schubert's) scalograms because they order a hierarchy of cases predicated on one variable, such as civil liberties, free speech, or economic liberalism.¹⁶ The fact is that different Justices, he claims, perceive a controversy in different ways. For example, how could one consider Frankfurter as casting a vote against a due process claim when he thinks of the case as "primarily a question of achieving a federal balance in criminal proceedings. . . ." ¹⁷ It

12. *Id.* at 190.

13. SCHUBERT, *op. cit. supra* note 5, at 273.

14. See, e.g., Schubert, *The 1960 Term of the Supreme Court: A Psychological Analysis*, 56 AM. POL. SCI. REV. 90, 97-99 (1962); Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, 22 J. POL. 629-53 (1960). It would be interesting to see if Guttman's methods could be fruitfully utilized to scale "issues" rather than "decisions."

15. BECKER, *POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE* 12 (1964).

16. Grossman, *Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter*, 11 J. PUB. L. 285 (1962).

17. *Id.* at 293.

cannot be denied that Justices view cases, from a normative standpoint, in terms of their particular scales of values. But whether a Justice's "societal" view is colored by so-called institutional factors (for instance, he may not believe that the judiciary is responsible for redressing this class of grievances), or is a product of his "authoritarian personality," his stand on the issue still represents an interpretation of constitutional law and, in the Frankfurter opinion just mentioned, a vote against a due process claim.

APPENDIX B¹

CASES TAKEN FROM THE 1962 TERM

- Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
 *Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962).
 Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).
 Douglas v. California, 372 U.S. 353 (1963).²
 Downum v. United States, 372 U.S. 734 (1963).
 Draper v. Washington, 372 U.S. 487 (1963).
 Edwards v. South Carolina, 372 U.S. 229 (1963).
 Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963).
 Gray v. Sanders, 372 U.S. 368 (1963).
 Haynes v. Washington, 373 U.S. 503 (1963).
 Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
 *Ker v. California, 374 U.S. 23 (1963).³
 Lombard v. Louisiana, 373 U.S. 267 (1963).
 *Lopez v. United States, 373 U.S. 427 (1963).
 NAACP v. Button, 371 U.S. 415 (1963).
 Peterson v. Greenville, 373 U.S. 244 (1963).
 Rideau v. Louisiana, 373 U.S. 723 (1963).
 Sherbert v. Verner, 374 U.S. 398 (1963).⁴
 *Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963).⁵
 Wong Sun v. United States, 371 U.S. 471 (1963).

1. A case that has been "starred" is one which the "libertarians" were in disagreement over the application of a constitutional right. Decisions containing two or more issues requiring "libertarian" or "societal" responses have been indicated through appropriate footnoting with the issues described in brief below.

2. This holding presents differences of opinion as to the meaning of both equal protection and due process.

3. The two issues contained in this decision are: (1) To what extent are the states limited by the *Mapp* rule; (2) How should that rule be construed in the instant case?

4. In this controversy, the meaning of both portions of the first amendment's guarantee of religious freedom are in dispute.

5. Black, Warren, and Douglas filed a dissent based on "serious errors denying the defendants the protection of two constitutional guarantees for a fair trial." These were (1) legality of defendant's confession, and (2) falsity of material witness' testimony.

APPENDIX C

CASES TAKEN FROM THE 1963 TERM

- *Aguilar v. Texas, 378 U.S. 108 (1964).
- *Aptheker v. Secretary of State, 378 U.S. 500 (1964).¹
- A Quantity of Books v. Kansas, 378 U.S. 205 (1964).²
- Baggett v. Bullitt, 377 U.S. 360 (1964).
- *Bell v. Maryland, 378 U.S. 226 (1964).
- *Bouie v. City of Columbia, 378 U.S. 347 (1964).
- Escobedo v. Illinois, 378 U.S. 478 (1964).
- *Griffin v. Maryland, 378 U.S. 130 (1964).
- *Jackson v. Denno, 378 U.S. 368 (1964).³
- *Jacobellis v. Ohio, 378 U.S. 184 (1964).⁴
- Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964).
- Malloy v. Hogan, 378 U.S. 1 (1964).⁵
- Massiah v. United States, 377 U.S. 201 (1964).
- Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
- *New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
- Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964).
- Reynolds v. Sims, 377 U.S. 533 (1964).⁶
- Schneider v. Rusk, 377 U.S. 163 (1964).
- *Ungar v. Sarafite, 376 U.S. 575 (1964).
- *United States v. Barnett, 376 U.S. 681 (1964).⁷
- *United States v. Tateo, 377 U.S. 463 (1964).
- Wesberry v. Sanders, 376 U.S. 1 (1964).⁸
- *Wright v. Rockefeller, 376 U.S. 52 (1964).

1. The question whether the law at issue is unconstitutional was decided by a vote of six to two. On the other hand, Black and Douglas vehemently disagreed on the meaning of the constitutional right to travel abroad.

2. There are two levels of division here. The first involves the constitutionality of procedures; the second, whether the books themselves may be proscribed.

3. This case contains four issues of significance. They are: (1) Can the state decide for itself whether a judge or jury shall determine the voluntariness of confessions? The vote here was six to three; (2) Is a jury required? Black and Clark answered this in the affirmative; (3) Is petitioner entitled to a new trial? Again, Black and Clark dissented; and (4) Was the confession coerced? Black stood alone on this question.

4. The four issues here are: (1) Can movies believed to be obscene be suppressed; (2) What is the nature of "contemporary community standards"; (3) Should the Supreme Court make a de novo review of all films found obscene; and (4) Can "The Lovers" be proscribed on this ground?

5. The two questions presented in this decision are whether the self-incrimination part of the fifth amendment is "incorporated" into the fourteenth amendment, and whether plaintiff has been denied a right under this provision. A third issue, dealing with whether the theory of "incorporation" applies to *all* of the Bill of Rights, is coded in *Griswold v. Connecticut*.

6. The two levels of disagreement here involve whether equal protection was violated and whether the court should establish the "one man-one vote" principle.

7. There are two issues here: (1) Was Ross Barnett entitled to a trial by jury; and (2) Can a judge exact even trivial penalties in criminal contempt cases of the type at issue?

8. The constitutional questions here involve the application of Article I, Section 2 and the equal protection clause.

APPENDIX D

CASES TAKEN FROM THE 1964 TERM

- *Angelet v. Fay, 381 U.S. 654 (1965).
- *Beck v. Ohio, 379 U.S. 89 (1964).
- *Boles v. Stevenson, 379 U.S. 43 (1964).
- Carrington v. Rash, 380 U.S. 89 (1965).¹
- Cox v. Louisiana, 379 U.S. 536 (1965).²
- *Cox v. Louisiana, 379 U.S. 559 (1965).
- *El Paso v. Simmons, 379 U.S. 497 (1965).
- *Estes v. Texas, 381 U.S. 532 (1965).³
- *Fortson v. Dorsey, 379 U.S. 433 (1965).
- *Freedman v. Maryland, 380 U.S. 51 (1965).
- *Garrison v. Louisiana, 379 U.S. 64 (1964).
- Griffin v. California, 380 U.S. 609 (1965).
- *Griswold v. Connecticut, 381 U.S. 479 (1965).⁴
- Holt v. Virginia, 381 U.S. 131 (1965).
- Jenkins v. United States, 380 U.S. 445 (1965).
- *Linkletter v. Walker, 381 U.S. 618 (1965).
- Louisiana v. United States, 380 U.S. 145 (1965).
- *McLaughlin v. Florida, 379 U.S. 184 (1964).
- *One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).
- Pointer v. Texas, 380 U.S. 400 (1965).
- *Swain v. Alabama, 380 U.S. 202 (1965).⁵
- Turner v. Louisiana, 379 U.S. 466 (1965).
- United States v. Brown, 381 U.S. 437 (1965).
- *United States v. Gainey, 380 U.S. 63 (1965).⁶
- *United States v. Ventresca, 380 U.S. 102 (1965).
- *Zemel v. Rusk, 381 U.S. 1 (1965).

1. Harlan disagreed with seven of his colleagues regarding two aspects of equal protection.

2. This case clearly deals with two distinct matters. The first of these is a breach of the peace question; the second concerns blocking public passages. However, the latter has two discernible aspects, one involving the Justices' reactions to free speech, the other relating to their views of equal protection.

3. In this decision, there are disputes as to whether petitioner was denied due process and whether television should be barred from all criminal court proceedings.

4. *Griswold* contains issues relating to the sweep of due process and free speech. There is also the matter of "incorporating" the Bill of Rights into the fourteenth amendment. Those Justices who expressed their opinions in the *Malloy* holding are also coded here.

5. The three dissenters disagree with the reasoning set out in White's opinion. Secondly, there is a difference of opinion between the dissenters and Black, at least to the extent that Black's vote serves to deny a "libertarian" claim put forth by the appellant.

6. There are three questions: self-incrimination; the right to jury trial; and due process.